90-287

NO. _____

THE SUPREME COURT OF THE UNITED STATES

OCTOBER, 1990

J. REED DUNKLEY and GRACE DUNKLEY,
husband and wife,

Petitioners,

v.

REGA PROPERTIES, LTD., et al,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is a Canadian Corporation which has assets in the United States, and which seeks the protection of the United States Bankruptcy Court, permitted to bifurcate its assets such that only the assets within the United States are placed before the bankruptcy court?

2. When Congress expanded the definition of "debtor" to include any person that has "property in the United States", did it intend to allow foreign corporations to seek the protection of the United States Bankruptcy Court without first filing a petition for protection in their own jurisdiction?

3. If Congress did intend to allow foreign corporations to seek the protection of the United States Bankruptcy Court without first filing a petition for protection in their own jurisdiction, is the foreign corporation allowed to seek protection of only those assets which are located in the United States?

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LIST OF PARTIES

J. REED DUNKLEY and GRACE DUNKLEY, husband and wife, were appellants below.

REGA PROPERTIES, LTD. includes owners RHEA FARMS, LTD., H.C. Wonnacott and his wife, Hal Wonnacott and his wife, and Guy Wonnacott and his wife. H.C. Wonnacott is the father of Hal and Guy. H.C. Wonnacott and his wife are the owners of RHEA FARMS, LTD.

OPINIONS BELOW

A copy of the opinion of United States District Court Judge (Eastern District, Washington), entered September 13, 1988, is attached as part of the appendix. A copy of the opinion of the Ninth Circuit, O'Scannlain, J., entered February 1, 1990, is attached as part of the appendix. A copy of the Order Denying Rehearing, entered April 10, 1990, is

attached as part of the appendix.

STATEMENT OF GROUNDS UPON WHICH JURISDICTION IS INVOKED

i. The opinion to be reviewed was filed on February 1, 1990.

ii. The order denying rehearing was filed on April 10, 1990.

iii. Not applicable.

iv. The United States Supreme Court has jurisdiction to review the decision of the Court of Appeals pursuant to 28 U.S.C. 1254. Appellate jurisdiction of the District Court and the Ninth Circuit is set forth by 28 U.S.C. 158.

The Ninth Circuit has decided an important question concerning jurisdiction of the Bankruptcy Court which has not been decided by the United States Supreme Court. The case is "important in the administration of the bankruptcy laws and is one of first impression in this

Court." Reading Co. v. Brown, 391 U.S. 471, 20 L.Ed.2d 751, 753, 88 S.Ct. 1759 (1968).

STATUTES AND RULES

This Writ of Certiorari is based upon the statutes contained in 11 U.S.C. et.seq. The specific statutes relied upon in the Writ are:

11 U.S.C. 109;
11 U.S.C. 304;
11 U.S.C. 365 (in pertinent part);
11 U.S.C. 521;
11 U.S.C. 541;
11 U.S.C. 1106 (in footnote);
11 U.S.C. 1107 (in footnote);
and 11 U.S.C. 1123 (in footnote).

This Writ of Certiorari is also based upon Bankruptcy Rule 4002.

Unless otherwise specified, each statute and rule is set out in full in the attached appendix.

STATEMENT OF THE CASE

In 1981, the debtor, Rega Properties, Ltd. ("Rega"), a closely held Cana-

dian corporation, contracted to purchase approximately 450 acres of land in Spokane, Washington from Tanglewood Enterprises, Inc. Tanglewood Enterprises, Inc. is a Washington corporation solely owned by J. Reed and Grace Dunkley ("Dunkleys"). The purchase price was $765,000.00 American. The contract provided for annual payments in the amount of $180,000.00 American.

The contract expressly provided that any funds received from Rega were first to be applied to three underlying contracts. By June 25, 1985, two of the three underlying contracts were paid off. The only remaining underlying contract was to Mrs. Jean Johns, in the amount of $162,000.00, with annual payments of $20,953.00.

As payments were made to the Dunk-

leys, 10-acre parcels were deeded free and clear to Rega. Prior to 1984, Rega had received title to eleven lots. Rega sold one of the lots for cash and traded three of the lots for a mobile home park. Later, Rega sold the mobile home park for cash and a contract. Rega's financing for purposes of development were arranged through the Royal Bank of Canada.

In 1982, the Dunkleys borrowed $157,000.00 from Pacific Securities Company ("Pacific"). The Dunkleys personally guaranteed payment of the loan and, through their corporation, assigned the Rega contract to Pacific. The Dunkleys intended to pay the Pacific loan with the 1984 payment from Rega.

In June of 1984, Rega, through H.C. Wonnacott, notified the Dunkleys that it would not be able to make the 1984 pay-

ment of $180,000.00. After negotiations and an aborted lawsuit, Rega and the Dunkleys agreed to a six-month extension, during which Rega would pay monthly interest to Pacific. The extension agreement was signed on August 31, 1984. Rega made only one extension payment.

On the day before the extension was signed by Rega, and without notice to the Dunkleys, Rega transferred ownership of all of its United States assets to Rhea Farms, Ltd., another Canadian corporation wholly owned by H.C. Wonnacott. Rega assigned its interest in the contract which financed the sale of the mobile home park to Rhea Farms, Ltd. The assigned contract was worth in excess of $140,000.00 American. It also encumbered the remaining seven lots by deeds of trust running from Rega to Rhea Farms,

Ltd. The deeds of trust were to ensure payment in the amount of $407,000.00 American. Later, when the Dunkleys learned that Rega had transferred its unencumbered assets to Rhea Farms, Ltd., for no consideration [1], they filed suit against the Wonnacotts personally. [2]

Rega subsequently defaulted on the

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1. There is continuing confusion as to whether and in what amount any consideration was given for this transfer to another wholly-owned company. Rega testified, though, that the transfer was to obtain sufficient Canadian assets to satisfy the Royal Bank of Canada.

2. A Spokane County Superior Court found in favor of the Dunkleys, holding that the transfer of property from Rega to Rhea Farms, Ltd., damaged the Dunkleys. The Court of Appeals, Division Three, a Washington state appellate court, overturned the decision, holding essentially that the disregard of corporate form was not an intentional abuse of the corporation and further that the transfer did not cause the Dunkleys any harm, because Rega was insolvent at the time of transfer anyway and therefore could not have paid the Dunkleys.

contract with the Dunkleys. The Dunkleys brought suit in Washington state court, seeking enforcement of the contract with Rega. On the eve of trial, Rega filed for protection under Chapter 11 in the United States Bankruptcy Court. In its initial and subsequent filings, Rega has refused to list its substantial assets located in Canada. It has maintained that the United States court does not have jurisdiction over assets located in Canada.

The Dunkleys moved for dismissal of Rega's bankruptcy petition or, alternatively, the appointment of a trustee to begin an ancillary action in Canada. As the basis for the motion, the Dunkleys cited, among other things, Rega's transfer of all of its unencumbered assets to Canada for no consideration and its re-

fusal to submit assets located in Canada to the jurisdiction of the United States Bankruptcy Court. In response, Rega filed a motion to reject the executory contract with the Dunkleys, pursuant to 11 U.S.C. 365.

On February 4, 1986, a hearing was held to address the Dunkley's motion and Rega's counter-motion. The bankruptcy commissioner questioned the court's authority to supervise reorganization of Canadian assets. Instead, the commissioner decided to allow Rega to reject the contract with the Dunkleys. Later, Judge Klobucher later found that the Dunkleys were injured in the amount of $11,330.40 (damages of $4,969.00 for loss of their contract, plus pre-petition attorney's fees for breach of contract).

In Judge Klobucher's oral opinion,

at Bankruptcy Court Clerk's Paper Number 158, page 17, the Judge stated:

> I was aware at the time of the first hearing in this case that the debtors had not listed the corporation's Canadian assets, and that they were not accounting on a regular basis for the activities that were being conducted in Canada. And the big issue at that time was how much do they owe Mr. Dunkley because it appeared that if his claim was, as they felt, was either non-existent or was minimal, there really weren't that many problems with this case and there really wasn't--wouldn't appear justified or necessary (sic) to go to all of the expense of turning this thing over to a trustee...

In its opinion affirming the Bankruptcy Court's decision to allow Rega to reject the executory contract rather than dismiss the petition or appoint a trustee to begin an ancillary action, the District Court stated the following:

> With respect to Dunkley's contention that these proceedings were instituted in bad faith and that Rega was guilty of misconduct and fraud, the Bankruptcy Court made

several comments. The Court discussed the various financial difficulties which Rega had encountered with its Canadian financing arrangements and its inability to meet the rather substantial annual payment on the real estate contract with Dunkley.

The Bankruptcy judge made the following observations:

> But from what is in the evidence at this point, it does not appear to me that there has been any mismanagement of the assets of the corporation at this point during that period of time, the two years that have gone on. I don't see where the debtors have mismanaged anything. In fact, the appearance of the figures to me that [sic] they may be making progress on their Canadian obligations. I don't think it would be prudent or practical for me to interfere with their operations at this time with the additional expense of a trustee and to deprive them of their right to run their own business affairs.

In October, 1986, Pacific obtained a judgment in state court foreclosing its deed of trust. Pacific then conducted a sheriff's sale at which it purchased the

land. In addition, Pacific sought a deficiency judgment against the Dunkleys. The issue concerning whether Pacific is entitled to its foreclosure remedy is still being litigated.

ARGUMENT

QUESTIONS PRESENTED FOR REVIEW

1. Is a Canadian Corporation which has assets in the United States, and which seeks the protection of the United States Bankruptcy Court, permitted to bifurcate its assets such that only the assets within the United States are placed before the bankruptcy court?

Essentially, each court below, from the commissioner to the Ninth Circuit, has indicated that the question presented is whether the bankruptcy court should "burden" the Canadian corporation by appointing a trustee. Each court seems to overlook Rega's claim that the United States has no authority to appoint a trustee to manage Canadian assets. Each court fails

to see that Rega is claiming the right to proceed as it wishes in Canada, while enjoying the protection of the United States court system to deal with the Dunkleys. Essentially, each court has failed to address Rega's claim that it has the right to use the courts of the United States to stay proceeding on creditors located in the United States while it "reorganizes" its remaining assets out of the bankruptcy court's jurisdiction.

The question presented is whether the United States bankruptcy courts should allow such a bifurcation of reorganization. Is it the intent of the United States Congress to permit bifurcated jurisdiction, with only part of the assets involved in the "reorganization"? Did Congress intend that United States

Bankruptcy Courts would utilize their tremendous powers to stay creditors and reject contracts without first obtaining jurisdiction over all of the assets of the debtor, wherever located?

The answer is "no," but it cannot be resolved by looking only to the language of the Bankruptcy Code.

At first blush, it would appear that the Congress of the United States intended that all foreign corporations would seek bankruptcy protection, or its equivalent, in the country in which the business was formed, and then seek ancillary proceedings in the United States pursuant to 11 U.S.C. 304. Once a foreign bankruptcy proceeding was instituted, the "foreign representative", a trustee, could apply to the bankruptcy courts of the United States for authority to admin-

ister assets located in this country, or for other appropriate relief, such as protection from creditors located in the United States.

Congress probably never envisioned, however, that a foreign corporation would take advantage of the rather liberal definition of "debtor" found in 11 U.S.C. 109. Under 11 U.S.C. 109(a) and (d), a foreign corporation may seek Chapter 11 reorganization under the United States Bankruptcy Code.

2. When Congress expanded the definition of "debtor" to include any person that has "property in the United States", did it intend to allow foreign corporations to seek the protection of the United States Bankruptcy Court without first filing a petition for protection in their own jurisdiction?

It is the Dunkley's position that Congress intended that foreign corporations seek bankruptcy protection first in their country of formation.

For instance, in Angulo v. Kedzep Ltd., 29 Bankr. 417 (1983), Kedzep Ltd., a Canadian subsidiary corporation of International Systems and Controls Corporation, sought bankruptcy protection in Canada. After conducting a preliminary investigation of the claims asserted against Kedzep Ltd., the Canadian trustee decided to conduct discovery concerning assets held in the United States by International Systems and Controls Corporation, a U.S. corporation. The District Court Judge held that section 304 applied. The Canadian corporation could aid its bankruptcy proceeding by means of an ancillary proceeding in the United States. Congress probably believed that the scenario presented in Angulo would be the scenario presented in all cases in which a foreign corporation sought bank-

ruptcy protection.

Further, application of section 304 would carry out many protections envisioned by the Congress, but not accorded to the Dunkleys. In section 304 Congress sought: (1) that all claims holders be treated the same; (2) protection of United States claim holders against prejudice and inconvenience; (3) prevention of preferential or fraudulent disposition of assets; (4) distribution of estate assets in the order envisioned by Congress; (5) comity; and (6) the provision of a fresh start to the "individual that such foreign proceeding concerns." In the present case, little was done to protect the United State's creditor. Congress's request for "just treatment" was ignored when the bankruptcy court allowed the Canadian corporation to rebuild its

Canadian assets at the expense of the creditor in the United States. Mr. Wonnacott testified that Rega reduced its indebtedness to Royal Bank of Canada "close to" $400,000.00 in the two years that it held the Dunkleys at bay. By providing preferential treatment to the Canadian creditors, Rega was able to substantially alter its position at the expense of the Dunkleys. [3] The record indicates that Rega used the United States bankruptcy court to accord preferential treatment to its Canadian creditors. Rega had already made a "preferential...disposition of property" to itself by transferring ownership of all of its

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3. There is nothing anywhere in the record which shows that Rega reorganized its business in the sense used in bankruptcy litigation. The record demonstrates that Rega was able to meet its obligations by eliminating one creditor, the Dunkleys.

assets located in the United States to a corporation located in Canada. The U.S. courts have refused to address this preferential disposition of property. Section 304(c)(5) refers to the need for "comity", but there was no Canadian action. Only section 304(c)(6), the "fresh start" provision, was followed by the bankruptcy court. The "fresh start" concept was an important reason why the bankruptcy court did not want to "burden" the Canadian corporation.

3. If Congress did intend to allow foreign corporations to seek the protection of the United States Bankruptcy Court without first filing a petition for protection in their own jurisdiction, is the foreign corporation allowed to seek protection of only those assets which are located in the United States?

In the event the Supreme Court believes that the term "debtor" is sufficiently broad to allow full proceedings for foreign corporations in the United

States, it is the Dunkley's position that Congress intended that the Bankruptcy Court exercise greater control over assets than what has occurred in this case. Even if Congress did intend foreign corporations to be chapter 11 debtors in United States courts, Rega's refusal to submit its Canadian assets to the administration of the United States bankruptcy court falls far short of what is required to invoke the power of the Bankruptcy Court.

Elemental bankruptcy law requires that there be a debtor, a creditor, and an estate. Rega claims to be a debtor. The Dunkleys are creditors. Rega claims, however, the right to bifurcate its estate between Canada and the United States, granting the United States Bankruptcy Court the power to administer only

the U.S. assets. The power to bifurcate assets is completely foreign to the philosophy of bankruptcy adjudication; as such, it could never have been the intent of Congress to provide the protections of the bankruptcy court without allowing the courts to assert jurisdiction over all the debtor's assets.

a. Rega is not meeting the code requirements established for a "debtor."

The entire code makes it clear that the debtor is to bring in the entire estate. 11 U.S.C. 521, "debtor's duties", requires the debtor to "file...a schedule of assets and liabilities." The statute does not say "...located within the United States." Bankruptcy Rule 4002 requires that the debtor "inform the trustee immediately in writing as to the location of real property in which the debtor has an interest..." The Rule does

not say "...located within the United States."

Moreover, the entire concept of Chapter 11 reorganizations is that the debtor is to be his own trustee, that the debtor is a "debtor in possession." 11 U.S.C. 1107. [4] A "debtor in possession" is akin to a receivership without a receiver, and the debtor bears essentially the same fiduciary obligation to creditors as does the trustee for a debtor out of possession. Wolf v. Weinstein, 372 U.S. 633, 83 S.Ct. 969, 10 L.E.2d 427

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4. 11 U.S.C. 1107 states in pertinent part: (a) Subject to any limitations on a trustee under this chapter, and to such limitations or conditions as the court prescribes, a debtor in possession shall have all the rights, other than the right to compensation under section 330 of this title, and powers, and shall perform all the functions and duties, except the duties specified in section 1106(a)(2), (3), and (4) of this title, of a trustee serving in a case under this chapter.

(1963). A trustee is required by statute to bring all of the assets of the debtor before the court. 11 U.S.C. 1106. [5] A trustee would have brought all the assets of Rega before the United States court; at least, that is what a Canadian trustee attempted to do when it learned of assets in the United States. Angulo v. Kedzep, Ltd., supra. The Dunkleys can only hope that the United States Bankruptcy Code provides them with as much protection as

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5. 11 U.S.C. 1106 states in pertinent part:
(a) A trustee shall--
...
(2) if the debtor has not done so, file the list, schedule, and statement required under section 521(1) of this title;
(3) except to the extent that the court orders otherwise, investigate the acts, conduct, assets, liabilities, and financial condition of the debtor; the operation of the debtor's business and the desirability of the continuance of such business, and any other matter relevant to the case or to the formulation of a plan;...

the Canadian code provides to Canadians.

b. Rega did not meet the Code's requirement that it bring the entire estate before the court.

Essentially, all property in which the debtor has a legal or equitable interest is property of the estate. 11 U.S.C. 541. Even property excluded under prior codes and decisions, to allow the debtor a "fresh start", is now included. The debtor is then permitted to exempt it. Goff v. Taylor, 706 F.2d 574,578, f.n. 10, (5th Cir. 1983).

Without asserting jurisdiction over all of the assets of the estate, it is hard to understand why the Bankruptcy Court felt it had jurisdiction to proceed. The clear language of the Code requires the Bankruptcy Court to assert its power over the debtor to the same extent that it asserts its power over the

creditor. Without asserting jurisdiction over the entire estate, the Bankruptcy Court did not have sufficient information or sufficient authority to reject the executory contract between Rega and the Dunkleys. Executory contracts are to be rejected only upon a finding that they are "burdensome to the estate" and would therefore threaten reorganization. In re Jackson Brewing Co., 567 F.2d 618 (5th Cir. 1978). Without asserting jurisdiction over all the assets of the estate, the Bankruptcy Court had no clue concerning whether the contract was burdensome.

c. Rega's refusal to place all of its assets before the bankruptcy court violated the "spirit" of the Bankruptcy Code.

In American United Mutual Life Insurance Co., v. City of Avon Park, Florida, 311 U.S. 138, 61 S.Ct. 157, 85 L.Ed. 91 (1940), the U.S. Supreme Court refused

to accept a Chapter IX municipality reorganization plan, because of a lack of full disclosure. The statements by the Court at 311 U.S. 146 are just as important in the context of this case as they were in 1940:

> Where such investigation discloses the existence of unfair dealing, a breach of fiduciary obligations, profiting from a trust, special benefits for the reorganizers, or the need for protection of investors against an inside few, or of one class of investors from the encroachments of another, the court has ample power to adjust the remedy to meet the need....It is not dependent on the express statutory provisions. It inheres in the jurisdiction of a court in bankruptcy. The necessity for its exercise is based on the responsibility of the court before entering an order of confirmation to be satisfied that the plan in its practical incidence <u>embodies a fair and equitable bargain openly arrived at and devoid of overreaching, however subtle.</u> (emphasis added; citations omitted).

That is what needs to happen in this case. It is not enough that the courts

of this country attempt, without sufficient information, to decide whether the "plan" adopted by the Canadian corporation "allowed it a fresh start"; the court is required to also see that fair play and substantial justice are accorded to the Dunkleys. This Court has stated the basic principle that each party involved in a bankruptcy proceeding is entitled to a "fair and equitable" adjudication. To stay a creditor and then reject his contract with the debtor without asserting jurisdiction over all the assets of the debtor violates that spirit of fair play.

d. Rega has violated the implicit "good faith" requirement of the Code.

The seminal case of In re Victory Construction Co, Inc., 9 Bankr. 549, 558 (1981), stated the "good faith" issue in this manner:

> The provisions of the Code dealing with rehabilitation and reorganization must be viewed as direct lineal descendants of a legal philosophy solidly embedded in American bankruptcy law. Review and analysis of Sections 74, 75, 77, 77B, Chapters IX, X, XI, XII and XIII, and cases decided under these sections, disclose a common theme and objective: avoidance of the consequences of economic dismemberment and liquidation, and the preservation of ongoing values in a manner which does equity and is fair to the rights and interests of the parties affected.

The facts of this case clearly show that dismissal for lack of good faith is an appropriate sanction.

Over the years, various courts have attempted to list what they felt were factors to be addressed in looking for violations of the "good faith" doctrine. See, e.g., In re Little Creek Development Co., 779 F.2d 1068 (5th Cir. 1986). Able trial counsel for the Dunkleys listed what he believed were sixteen viola-

tions of the "good faith" factors:

1. Rega is a closely held Canadian corporation registered to do business in the State of Washington;

2. Rega is the owner of millions of dollars of property located in Canada;

3. Rega is not an active business, and has not been an active business for years; [6]

4. Rega has no employees;

5. At the time the case was commenced, Rega had only two very small unsecured debts; [7]

6. Rega has had no cash flow;

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6. The Wonnacotts began a publishing business in 1985 (McCott Publishing), which has paid Rega a "fee" for "using" Rega's officers.

7. Rega's entire United States debt load, exclusive of the Dunkleys, was about $40,000.00 American in two secured debts (for lot improvement), and about $45,000.00 American in two unsecured debts.

7. Rega is the owner of only one large tract of undeveloped land in Washington;

8. Rega transferred all of its assets to Canada prior to filing, admittedly to make its Canadian financier more secure;

9. Rega filed for protection on the eve of trial;

10. Rega filed schedules but refused to list its assets located in Canada;

11. Rega listed Canadian debt and listed secured debt as being unsecured;

12. Rega has proceeded to "reorganize" its corporation without a reorganization plan;

13. Rega filed only one operating statement in the first 24 months of the "reorganization";

14. Rega sold substantially all of its Canadian assets without court knowledge or approval;

15. Rega paid hundreds of thousands of dollars to its officers without court knowledge or approval;

16. Rega repaid hundreds of thousands of dollars in "loans" to corporate officers, without court knowledge or approval.

Case law developed in the area of "good faith" seems to focus on two questions: (1) was the case commenced and prosecuted in a manner which is consistent with the objective and philosophy of the Code, or (2) was the case commenced and prosecuted in a manner which demonstrates abuse of the judicial process? In re Century City, Inc., 8 Bankr. 25 (1980); In re Eden Associates, 13 Bankr. 578 (1981).

There is no question that Rega had a legitimate debt problem. There is also no question that Rega used the judicial

system to obtain a "fresh start." Those uses of the United States Bankruptcy Courts appear to be within the objectives and philosophy of the Bankruptcy Code.

On the other hand, the objective and philosophy of the court system is to allow reorganization in an evenhanded manner. In re Victory Construction Co., supra. The object of a bankruptcy proceeding is the "securing of possession of the insolvent's assets and the equitable division thereof among creditors;..." Dranow v. United States, 307 F.2d 545, 557 (8th Cir. 1962). A relationship must exist between the petition and the "reorganization-related purpose" of Chapter 11. In re Coastal Cable T.V., Inc., 709 F.2d 762 (1st Cir. 1983). It is bad faith to use the Bankruptcy Court simply as a tool to stop state court proceed-

ings. Furness v. Lilienfield, 35 Bankr. 1006, 1012 (D. Maryland, 1983). The Bankruptcy Court cannot be used to resolve what is essentially a two-party dispute. In re Landmark Capital Co., 27 Bankr. 273 (1983). The cases cited above show that the Bankruptcy Courts must constantly be alert to their responsibilities to both the debtor and the creditor, refusing to allow the tremendous powers contained in the automatic stay and the authority to reject executory contracts to be used merely as a weapon by one party against the other.

The cases also state that the question is always whether the system is being utilized to reorganize, as the term is understood in bankruptcy proceedings. Rega reorganized its affairs, but it did not submit to reorganization under the

code.

The difference is more than semantical. The bankruptcy code envisions that a stay will be granted to allow the debtor breathing room and to stop a race by creditors to seize debtor's assets. Wedgeworth v. Fibreboard Corp., 706 F.2d 541, 544 (5th Cir. 1983). In exchange, creditors are guaranteed a voice in the debtor's affairs and some assurance of evenhanded treatment because the debtor has submitted its affairs to the jurisdiction of the bankruptcy court. Dranow v. United States, 307 F.2d 545, 557 (8th Cir. 1962). Only the power to protect the debtor happened here. The bankruptcy court acquiesced in Rega's argument that it could at one and the same time seek the court's protection while refusing to disclose its assets. Rega was allowed

the protection of the United States Bankruptcy Court to deal with debts located in the United States while it dealt with assets located in Canada. Such is not the way things were meant to be done.

For example, 11 U.S.C. 1123 [8] envisions that a plan of reorganization will be adopted which encompasses all of the assets of the debtor. As part of the plan, section 1123 envisions that the court may reject executory contracts, pursuant to section 365. In this case,

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8. 11 U.S.C. 1123 states in pertinent part:
(b) Subject to subsection (a) of this section, a plan may--

(1) impair or leave unimpaired any class of claims, secured or unsecured, or of interests;

(2) subject to section 365 of this title, provide for the assumption or rejection of any executory contract or unexpired lease of the debtor not previously rejected under section 365 of this title;
...

however, the Bankruptcy Court allowed rejection of the executory contract without a plan. There is simply no authority in law or equity which allows a Bankruptcy Court to deal piecemeal with the claims of creditors. Executory contracts are to be rejected only upon a finding that they are "burdensome to the estate" and would therefore threaten reorganization. In re Jackson Brewing Co., 567 F.2d 618 (5th Cir. 1978). Without asserting jurisdiction over all the assets of the estate, the Bankruptcy Court had no clue concerning whether the contract was burdensome. [9]

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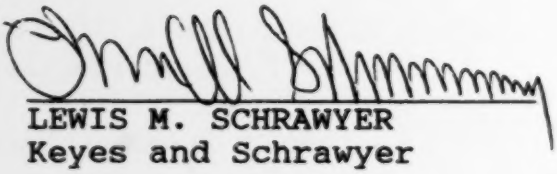
9. The contract was not burdensome. The record shows almost miraculous reorganization of the Canadian assets. The Bankruptcy Court simply erred in allowing rejection of the contract, almost solely because it lacked information about Rega's assets.

CONCLUSION

The United States Supreme Court should accept review of this case to decide (1) whether Congress intended foreign corporations to file bankruptcy petitions in the United States Bankruptcy Courts; (2) if it did, what authority the Bankruptcy Court would be able to assert over assets located outside the United States; and (3) whether the Bankruptcy Court acted in a manner in this case consistent with the answers to questions (1) and (2).

RESPECTFULLY SUBMITTED this 3rd day of July, 1990.



LEWIS M. SCHRAWYER
Keyes and Schrawyer

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

In re: REGA PROPERTIES, LTD., *Debtor*	
J. REED DUNKLEY, *Plaintiff-Appellant,* v. REGA PROPERTIES, LTD., *Defendant-Appellee.*	No. 88-4217 D.C. No. CV-87-719-RJM OPINION

Appeal from the United States District Court
for the Eastern District of Washington
Robert J. McNichols, Chief District Judge, Presiding

Argued and Submitted
October 4, 1989—San Francisco, California

Filed February 1, 1990

Before: William A. Norris, David R. Thompson and Diarmuid F. O'Scannlain, Circuit Judges.

Opinion by Judge O'Scannlain

SUMMARY

Bankruptcy/Appeals/Damages

Affirming the district court's order affirming the bankruptcy court's denial of a motion to dismiss a petition in

bankruptcy, the court held that denial of a motion to dismiss for bad faith filing is not a final, appealable order under 28 U.S.C. § 158(d).

In 1981, appellee Rega Properties, Ltd., contracted to purchase land in the Spokane Valley from Tanglewood Enterprises, Inc., a Canadian corporation owned solely by appellant J. Reed Dunkley and his wife. The contract required Rega to make annual payments to Dunkley, and as the payments were made, certain selected properties were severed and deeded to Rega. Three hundred forty acres remained untransferred under the contract, and in 1982, Dunkley borrowed $157,000 from Pacific Securities Company, securing the loan by a deed of trust on the properties still covered by Dunkley's contract of sale to Rega. After Dunkley defaulted on his obligation to Pacific, Pacific obtained a judgment foreclosing its deed of trust on the 340 acres. When Rega filed for protection under Chapter 11, the bankruptcy court authorized Rega to reject its real estate contract with Dunkley in accordance with 11 U.S.C. § 365. The bankruptcy court denied Dunkley's motion to dismiss alleging that Rega had filed in bad faith and resolved his claim by authorizing the return of the remaining land to Dunkley with damages representing the difference between Dunkley's claim and the value of the property. The district court affirmed, and Dunkley appealed.

[1] The jurisdictional question before the court was whether the district court's order affirming the bankruptcy court's decision denying Dunkley's motion to dismiss was a final, appealable order under 28 U.S.C. § 158(d). [2] In making such a determination, the Ninth Circuit uses a test that emphasizes the need for immediate review rather than whether the order is technically interlocutory. Orders that cause irreparable harm to the losing party are immediately appealable so long as the orders finally determine the discrete issues to which they are addressed, but when further proceedings in the bankruptcy court will affect the scope of the order,

the order is not subject to review under section 158. [3] In *In re 405 N. Bedford Dr. Corp.*, 778 F.2d 1374, the court held that a denial of a motion to dismiss for cause was not final under the Ninth Circuit's finality test. The decision in that case is controlling.

[4] Dunkley argued that he should receive actual damages under his contract with Rega, contending that the appropriate measure of damages for the rejected contract is controlled by *Smith v. King*, 106 Wash. 2d 443, in which the Washington Supreme Court held that the measure of damages was equal to the unpaid portion of the purchase price. [5] Unlike the situation in *Smith*, Dunkley's loss of the property was not directly caused by Rega's breach. Independent from his agreement with Rega, Dunkley obtained a loan from Pacific, and because he later defaulted on this obligation, he lost the land. Although Dunkley no longer possesses the land, the loss was not caused by Rega. Since this crucial fact is not present, *Smith* is not applicable.

COUNSEL

Joseph A. Esposito, Esposito, Tombari and George, Spokane, Washington, for the plaintiff-appellant.

Robert J. McKanna, Spokane, Washington, for the defendant-appellee.

OPINION

O'SCANNLAIN, Circuit Judge:

We consider the questions of whether a bankruptcy court order denying a motion to dismiss a petition in bankruptcy is an appealable "final order" and what is the appropriate measure of damages resulting from a rejected executory contract.

I

In February 1981, Rega Properties, Ltd. ("Rega") contracted to purchase land in the Spokane Valley from Tanglewood Enterprises, Inc., a Canadian corporation owned solely by Dunkley and his wife. Dunkley dissolved Tanglewood in 1984 and succeeded to all its rights, claims, and liabilities.

The contract required Rega to make annual payments to Dunkley. As the payments were made, certain selected properties were severed and deeded to Rega. Rega's payments entitled it to receive free and clear, eleven, ten-acre parcels of land; 340 acres remained untransferred under the contract.

In November 1982, Dunkley borrowed $157,000 from Pacific Securities Company ("Pacific"). The loan was secured by a deed of trust which Dunkley executed in favor of Pacific on the properties still covered by Dunkley's contract of sale to Rega. Dunkley used the loan proceeds for purposes unrelated to this appeal. Subsequently, Dunkley defaulted on his obligation to Pacific and thereafter Pacific obtained a judgment foreclosing its deed of trust on the 340 acres.

When Rega filed for protection under Chapter 11 in June 1985, the bankruptcy court authorized Rega to reject its real estate contract with Dunkley in accordance with 11 U.S.C. § 365. Dunkley subsequently moved to dismiss Rega's bankruptcy petition for cause under 11 U.S.C. § 1112(b), alleging that Rega had filed in bad faith. The bankruptcy court denied Dunkley's motion to dismiss and resolved his claim by authorizing the return of the remaining land to Dunkley with damages representing the difference between Dunkley's claim and the value of the property.

The district court affirmed the bankruptcy court's order denying Dunkley's motion to dismiss and determining the measure of damages. Dunkley now appeals from the district court's judgment.

II

Under 28 U.S.C. § 158(d),[1] the courts of appeals have jurisdiction over appeals only from final decisions, judgments, orders, and decrees entered by a district court from a bankruptcy appeal. *Zolg v. Kelly (In re Kelly)*, 841 F.2d 908, 911 (9th Cir. 1988); *King v. Stanton (In re Stanton)*, 766 F.2d 1283, 1285 (9th Cir. 1985).[2] Unlike the district courts, the courts of appeals may not grant leave to hear interlocutory bankruptcy appeals. "Interlocutory orders are not appealable as of right. They may be reviewed at the discretion of the district courts . . . but they are not appealable to the court of appeals under 28 U.S.C. § 158(d)." *Pizza of Hawaii, Inc. v. Shakey's, Inc. (In re Pizza of Hawaii, Inc.)*, 761 F.2d 1374, 1378 (9th Cir. 1985) (citations omitted).

[1] In this case, the bankruptcy court denied Dunkley's motion to dismiss Rega's bankruptcy action for bad faith under section 1112(b),[3] and the district court affirmed. There-

[1]This section provides: "The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section." 28 U.S.C. § 158(d).

[2]Rega contends the district court did not have jurisdiction under 28 U.S.C. § 158(a) over Dunkley's appeal from the bankruptcy court's order denying his motion to dismiss. Section 158(a) authorizes district courts to hear appeals from final bankruptcy orders or from interlocutory bankruptcy orders if the district court grants leave to appeal. Rega argues that the bankruptcy court's order did not explicitly deny Dunkley's motion to dismiss. However, since the bankruptcy action is still proceeding, we believe it is reasonable to conclude that the bankruptcy court, in effect, denied Dunkley's motion to dismiss. Second, Rega contends that since a denial of a motion to dismiss is generally considered interlocutory, the district court would have jurisdiction only if it granted leave to appeal. We believe, however, that the district court implicitly granted leave to appeal because it actually ruled on the appeal. *See Committee of Unsecured Creditors v. Interfirst Bank Dallas (In re Wood and Locker, Inc.)*, 868 F.2d 139, 141-42 (5th Cir. 1989).

[3]11 U.S.C. § 1112(b) provides that the bankruptcy court "may dismiss a case under this chapter . . . for cause." 11 U.S.C. § 1112(b).

fore, the jurisdictional question before us is whether the district court's order affirming the bankruptcy court's decision denying Dunkley's motion to dismiss is a final, appealable order under section 158(d).

[2] This court has adopted a pragmatic approach to deciding whether a bankruptcy court's order is final, "recognizing that 'certain proceedings in a bankruptcy case are so distinct and conclusive either to the rights of individual parties or the ultimate outcome of the case that final decisions as to them should be appealable as of right.' " *United States v. Technical Knockout Graphics, Inc. (In re Technical Knockout Graphics, Inc.)*, 833 F.2d 797, 800 (9th Cir. 1987) (quoting *Mason v. Integrity Ins. Co. (In re Mason)*, 709 F.2d 1313, 1317 (9th Cir. 1983)).

This court uses a test that " 'emphasizes the need for immediate review, rather than whether the order is technically interlocutory, in determining what is appealable as a final judgment in bankruptcy proceedings.' " *Farber v. 405 N. Bedford Dr. Corp. (In re 405 N. Bedford Dr. Corp.)*, 778 F.2d 1374, 1377 (9th Cir. 1985) (quoting *White v. White (In re White)*, 727 F.2d 884, 885 (9th Cir. 1984)). Orders that cause irreparable harm to the losing party are immediately appealable, *In re Mason*, 709 F.2d at 1316, so long as the orders finally determine the discrete issues to which they are addressed. *Four Seas Center Ltd. v. Davres, Inc. (In re Four Seas Center, Ltd.)*, 754 F.2d 1416, 1418 (9th Cir. 1985). But when " 'further proceedings in the bankruptcy court will affect the scope of the order, the order is not subject to review in this court under [section 158].' " *In re 405 N. Bedford Dr. Corp.*, 778 F.2d at 1377 (quoting *Four Seas*, 754 F.2d at 1418).

In a recent bankruptcy case, the Bankruptcy Appellate Panel ("BAP") for the Ninth Circuit determined that the bankruptcy court's order denying a motion to dismiss for bad faith, in that particular case, was a final, appealable order. *Canadian Commercial Bank v. Hotel Hollywood (In re Hotel*

Hollywood), 95 Bankr. 130, 132 (Bankr. 9th Cir. 1988) ("We are of the view that the orders appealed from, given the circumstances of this case, affect the rights of the parties with a degree of finality sufficient to warrant appellate review."). While the BAP considered the bankruptcy court's orders in *In re Hotel Hollywood* to be final and thus appealable, we nonetheless determine that in this case the bankruptcy court's order denying Dunkley's motion to dismiss for bad faith is not a final, appealable order.

[3] We believe that this case is controlled by our decision in *In re 405 N. Bedford Dr. Corp.*, which held that a denial of a motion to dismiss under section 1112(b) for cause was not final under this circuit's finality test and therefore this court did not have jurisdiction.[4] In *In re 405 N. Bedford Dr. Corp.*, as in this case, creditors brought a motion in bankruptcy court to dismiss the debtor's petition under section 1112(b) for bad faith. The bankruptcy court had denied the creditor's motion to dismiss and the district court affirmed.

Dunkley argues that he will suffer irreparable harm if he cannot immediately appeal and that he has no other avenues available to protect his interest. But, as this court noted in *In re 405 N. Bedford Dr. Corp.*, there are adequate protections provided under the Bankruptcy Code. "Although the beneficiaries will have to continue their participation in the reorganization process, their interests will be protected while they participate." 778 F.2d at 1377; *see, e.g.*, 11 U.S.C. §§ 361, 363(e) (creditor's right to adequate protection).

Furthermore, in *In re 405 N. Bedford Dr. Corp.*, this court

[4]Generally, the denial of a motion to dismiss is considered nonfinal. *See* 1 Collier on Bankruptcy ¶ 3.03[6][b] at 3-172 (1989)("[D]enial of a motion to dismiss . . . is interlocutory"); *John E. Burns Drilling Co. v. Central Bank*, 739 F.2d 1489, 1491 (10th Cir. 1984) (court of appeals lacks jurisdiction to review bankruptcy court's denial of motion to dismiss because it is not a final decision).

noted strong policy reasons for not considering the denial of a motion to dismiss a final order:

> [C]lassifying the denial of a motion to dismiss for bad faith filing as a final order would have an undesirable impact on the reorganization process. Creditors would be forced to appeal the bad faith filing issue to this court immediately or forego appealing the issue to this court entirely .... If an immediate appeal to this court is permitted, the bankruptcy court is then faced with the difficult choice of whether to proceed with the reorganization process knowing that the appeal of bad faith filing issue may render further reorganization proceedings unnecessary, or stay the reorganization pending our decision. If the reorganization process is stayed and we affirm the denial of the motion to dismiss, then the reorganization process is unnecessarily delayed.

778 F.2d at 1379.

We conclude that Dunkley's situation does not present irreparable harm or special hardship. Accordingly, under this court's finality analysis, the bankruptcy court's order denying Dunkley's motion to dismiss for bad faith filing is not a final order, and thus this court does not have jurisdiction over Dunkley's appeal of that portion of the district court's order which affirmed such denial.

III

Dunkley argues that the district court erred in affirming the bankruptcy court's determination of the measure of damages. The bankruptcy court deducted the value of the property from the contract price. We have jurisdiction under section 158(d) to review the bankruptcy court's determination of measure of damages because it is a final decision disposing of Dunkley's claim.

Both Dunkley and Rega argue that Washington law should determine the measurement of damages resulting from the rejected executory contract. The bankruptcy court apparently used a federal measure of damages. Although the district court affirmed the bankruptcy court's use of the federal measure of damages, it noted that the application of either the federal or state law would lead to the same result. We now consider whether state or federal law applies.

A.

The rejection of a contract under bankruptcy law "constitutes a breach of such a contract." 11 U.S.C. § 365. Although the rejection of the real estate contract between Rega and Dunkley results from the application of the Bankruptcy Code — specifically section 365 — the measurement of damages appears to be determined by applying state law as long as it is not inconsistent with federal bankruptcy policy.

The Supreme Court in *Butner v. United States*, 440 U.S. 48, 55 (1979), stated that "[p]roperty interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding." The Sixth Circuit has extended this reasoning to contract law. The principle that "state law should generally be used to decide issues regarding property interests — applies equally to contract cases, which would be governed by state law absent the bankruptcy." *Ohio v. Collins (In re Madeline Marie Nursing Homes)*, 694 F.2d 433, 439 (6th Cir. 1982) (finding that the bankruptcy court failed to examine state law and to accord due respect to Medicaid scheme in determining Ohio's claim against debtor for reimbursements under Medicaid program).

This court has also applied state contract law to issues arising under bankruptcy law. "Although whether a given contract is 'executory' under the Bankruptcy Act is an issue of

federal law . . . the question of the legal consequences of one party's failure to perform its remaining obligations under a contract is an issue of state contract law." *Hall v. Perry (In re Cochise College Park, Inc.)*, 703 F.2d 1339, 1348 n.4 (9th Cir. 1983).

Although state law is the starting point, "[c]ase law has further established that the bankruptcy courts, as courts of the United States, have power to supersede state law where it conflicts with the federal bankruptcy law which the court is primarily bound to enforce." *In re Madeline Marie*, 694 F.2d at 436-37. Therefore, we must next examine relevant Washington law and consider whether the applicable state law is consistent with federal bankruptcy policy.

B.

[4] Dunkley and Rega disagree on the appropriate measurement of damages under Washington law. Dunkley argues that he should receive "actual damages" under his contract with Rega. He contends that the appropriate measure of damages for the rejected contract is controlled by *Smith v. King*, 106 Wash. 2d 443, 722 P.2d 796 (1986), in which the Washington State Supreme Court held that the measure of damages was equal to the unpaid portion of the purchase price. In *Smith*, the owners of an apartment building sold the building to purchasers under a real estate contract. The first purchasers then resold the property to second purchasers under a separate real estate contract, in which the second purchasers expressly assumed and agreed to pay all amounts due to the owners on the first contract. The second purchasers subsequently abandoned the property and made no payments either to the owners or to the first purchasers. The owners then brought an action to forfeit out the interest of both the first and second purchasers in the property. The Washington Supreme Court held that the first purchaser could recover damages from the second purchaser in an amount equal to the unpaid portion of the purchase price.

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Rega, however, contends that the "traditional" measurement of damages, as illustrated by *Reiter v. Bailey*, 180 Wash. 230, 39 P.2d 370 (1934), is the appropriate law to apply for the measurement of damages in this case. In *Reiter*, the plaintiffs contracted with the defendants to sell a piece of property. After making several payments under the contract, the defendants failed to make any more payments. The Washington Supreme Court held that "[t]he rule for the measure of damages applicable here is . . . the difference between the unpaid balance of the principal and the market value of the property at the time of the breach." 39 P.2d at 372.

Rega argues that *Smith* should not apply to this case because, unlike the facts in *Smith*, Rega did not cause Dunkley to lose the land by foreclosure. We agree. The *Smith* court chose not to apply the traditional measure of damages because the traditional measure of damages presupposes that the nonbreaching party would be able to realize the property's market value by subsequently selling the property. In *Smith*, "[s]uch was not the case . . . . Rather, the second purchasers' breach of contract caused the first purchasers' entire interest in the property to be forfeited back to the original owners." 722 P.2d at 800.

[5] Unlike the situation in *Smith*, Dunkley's loss of the property was not directly caused by Rega's breach. Independent from his agreement with Rega, Dunkley obtained a loan from Pacific. He secured the loan by executing a deed of trust to Pacific upon the properties still covered by the contract of sale to Rega. Because Dunkley later defaulted on his obligation to Pacific, he lost the land. Although Dunkley no longer possesses the land, this loss was not caused by Rega. Therefore, since this crucial fact is not present in this case, *Smith* is not applicable.

Moreover, applying *Smith* to this case would be inconsistent with the purpose of rejecting executory contracts under section 365. The purpose of allowing rejection of an execu-

tory contract under section 365 is to make the debtor's rehabilitation more likely. *Richmond Leasing Co. v. Capital Bank,* 762 F.2d 1303, 1310 (5th Cir. 1985). Also, "[r]ejection of an executory contract serves two purposes. It relieves the debtor of burdensome future obligations while he is trying to recover financially and it constitutes a breach of a contract which permits the other party to file a creditor's claim." *In re Norquist,* 43 Bankr. 224, 225 (Bankr. E.D. Wash. 1984). Given this purpose, the Fourth Circuit recently held that specific performance was not an available relief under section 365 because "it would undercut the core purpose of rejection." *Lubrizol Enter., Inc. v. Richmond Metal Finishers, Inc. (In re Richmond Metal Finishers, Inc.),* 756 F.2d 1043, 1048 (4th Cir. 1985), *cert. denied,* 475 U.S. 1057 (1986).

Similarly, allowing recovery of the contract price would also undercut the purpose of rejection under section 365. As the district court pointed out in its memorandum decision, "[i]f the Court were to accept the argument made by the Dunkleys, that is that they were entitled to the balance due on the contract, presumptively in cash, what point would there be to a rejection of an executory contract under 11 U.S.C. § 365?" *Dunkley v. Rega Properties, Ltd. (In re Rega Properties, Ltd.),* No. C-87-719 RJM, slip op. at 5-6 (E.D. Wa. Sept. 13, 1988).

Because the *Smith* measure of damages may not appropriately apply in this case under Washington law and because it appears inconsistent with the purpose of allowing the rejection of executory contracts under section 365, *Smith* does not apply to this case. We agree with the bankruptcy court that the *Reiter* measure of damages, which deducts the value of the property, is the appropriate measure of damages to apply to this case. Therefore, the district court did not err in affirming the bankruptcy court's determination of measure of damages resulting from the rejected executory contract between Rega and Dunkley.

IV

Because we do not have jurisdiction under section 158(d), we dismiss Dunkley's appeal from that portion of the district court's order affirming the bankruptcy court's denial of his motion to dismiss. We affirm, however, that portion of the district court's order affirming the bankruptcy court's determination of damages.

Appellant will bear the costs.

AFFIRMED in part and DISMISSED in part.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

IN RE: REGA PROPERTIES, LTD., Debtor,	)	No. C-87-719 RJM
J. REED DUNKLEY, et ux, Appellants, -vs- REGA PROPERTIES, LTD., Appellee.	)	MEMORANDUM DECISION

Although the facts giving rise to this controversy are not in significant dispute, a brief summary may be helpful in understanding the court's decision. In 1981 the debtor, Rega Properties, Ltd., ("Rega") a closely held Canadian corporation contracted to purchase ap-

proximately 450 acres of land in the Spokane area from Tangelwood Enterprises, Inc., a corporation solely owned by the appellants, Mr. and Mrs. Dunkley. The corporation and the shareholders will be referred to herein as Dunkley. The contract price was $765,000.00. The contract provided for annual payments in the amount of $180,000.00. As payments were made certain selected properties which were developed by Rega were severed and deeded to Rega. Rega's financing for purposes of development was arranged through the Royal Bank of Canada.

In 1982 Dunkley borrowed $157,000.00 from Pacific Securities Company. The loan was secured by Dunkley executing Deed of Trust to Pacific upon the property still covered by the contract of sale to Rega. The proceeds of this loan were

apparently used by Dunkleys for purposes unrelated to these proceedings. Subsequently, Rega encountered financial difficulties. There were extensive negotiations on more than one occasion between Rega and Dunkley seeking to protect the interest of both parties. For whatever reasons, these negotiations proved unsuccessful. After one state court action by Dunkley against Rega had been dismissed, further negotiations were unsuccessful. A second action was commenced in the state court. Unable to resolve the matter, Rega filed for protection under Chapter XI of the Bankruptcy Act.

The Bankruptcy Court authorized Rega to reject the real estate contract in accordance with 11 U.S.C. Section 365. The Order authorizing such rejection was not appealed and the efficacy of that

Order is not before this Court. Subsequent to the rejection, the Bankruptcy Court held an evidentiary hearing to determine the fair value of the property still remaining under the real estate contract and found the value to be $600,-000. The court then resolved Dunkley's claim in the Bankruptcy proceedings by authorizing a return of the property to Dunkley together with damages representing the difference between the value of the real estate remaining and Dunley's [sic] claim as allowed by the Bankruptcy Court.

Dunkley appealed the order of the Bankruptcy Court asserting the following contentions:

1. That this Court should dismiss the bankruptcy proceedings in their entirety. The argument is that Rega acted

in bad faith in seeking relief from the Bankruptcy Court and engaged in fraud and misrepresentation. [1]

2. That after permitting Rega to disaffirm the real estate contract with Dunkley, the court applied the wrong measure of damages.

In presenting the issues, Dunkley states in the brief "There are no facts in dispute. Therefore, the only issues presented to this Court for review are legal issues arising from the Bankruptcy judge's Conclusions of Law as found in his oral decision and in the written Conclusions of Law entered on October 13, 1987."

The court has reviewed the entire file, including the Bankruptcy judge's

[1]. Rega challenges the court's jurisdiction to hear the first issue. Because of the mode of disposition it is unnecessary to address that question.

oral decision contained in the record of the hearing conducted on June 16, 1987.

With respect to Dunkley's contention that these proceedings were instituted in bad faith and that Rega was guilty of misconduct and fraud, the Bankruptcy Court made several comments. The court discussed the various financial difficulties which Rega had encountered with its Canadian financing arrangements and its inability to meet the rather substantial annual payment on the real estate contract with Dunkley.

The Bankruptcy judge made the following observations:

> But from what is in the evidence at this point, it does not appear to me that there has been any mismanagement of the assets of the corporation at this point during that period of time, the two years that have gone on. I don't see where the debtors have mismanaged anything. In fact, the

appearance of the figures to me that they may be making progress on their Canadian obligations. I don't think it would be prudent or practical for me to interfere with their operations at this time with the additional expense of a trustee and to deprive them of their right to run their own business affairs.

I don't think there was anything in this record that has indicated to me that in this case they have been guilty of any type of misconduct or any type of fraudulent conduct of any kind. They made some maneuvers in trying to settle that lawsuit that was early filed in an effort, I am sure, to try to straighten out their Canadian financing opportunities. They were in a situation where their bank wasn't them any more money or - - and I am sure that they felt that if they played ball with their financier that they could get some consideration in return, and I don't think that - - I think that their obligations as I would have determined them to be at this point in the United States should be readily capable of being satisfied and straightened out with minimal intervention by the Court.

The Findings of Fact entered by the Bankruptcy Court substantially track the court's oral decision. The Findings themselves are not challenged; however, because the appellant's argument both in the brief and at the time of hearing was a challenge to the Findings, the Court has carefully reviewed the record submitted.

The Bankruptcy judge heard extensive testimony relating to "maneuvers" by Rega and concluded that they were good faith efforts to maintain the company's credit with the Canadian bank and enable Rega to continue to develop the property and meet its obligations. The Bankruptcy judge, of course, had the opportunity to observe the witnesses and is in a much better position than this Court to determine what was really going on during this two

to three year period. The Bankruptcy judge concluded that there was no bad faith or fraud and that the conduct of Rega management constituted a legitimate effort to avoid the very thing which happened, that is Rega filing for relief in the Bankruptcy court.

This Court cannot say that the Bankruptcy judge's Findings are clearly erroneous.

MEASURE OF DAMAGES

The second issue relates to the proper measure of damages resulting from the rejection of the real estate contract. The valuation of the property is not challenged on appeal.

The Bankruptcy judge was of the opinion that the measure of damages would be governed by federal law rather than state law. However, he also concluded

that there was no significant difference.

If the Court were to accept the argument made by the Dunkley's that is that they were entitled to the balance due on the contract, presumptively in cash, what point would there be to a rejection of an executory contract under 11 U.S.C. Section 365?

The Court agrees with the Bankruptcy judge's determination of the damage issue. First of all, it seems only logical to me that in permitting the rejection of the contract pursuant to the Bankruptcy Act, that federal law should apply. The Bankruptcy court must fashion equitable relief on a case by case basis. However, if state law is applicable, I would still agree with the Bankruptcy court that the rationale of Smith v. King, 106 Wn.2d 443, 722 P.2d 370 (1986) would not apply

to this case. Smith v. King was based on an unusual factual pattern. I believe the better rule is Reiter v. Bailey, 180 Wn. 230, 39 P.2d 370 (1934).

The record does not reflect whether Dunkley ever requested an order of the court formally transferring the property. Obviously such an order would have been only a formality. Neither does the record reflect whether Dunkley made any effort to sell the property.

The Court can understand the dilemma which the Dunkleys were facing. Although they were entitled under the Bankruptcy court's order to the return of property having a value of $600,000, they apparently were without funds to pay other obligations which they had incurred against their interest in the property. All of this resulted in a foreclosure of the

Deed of Trust by Pacific Securities.

Notwithstanding these unfortunate circumstances, the Bankruptcy Court's rulings on the two issues presented to this Court are affirmed.

IT IS SO ORDERED.

DONE BY THE COURT this 13th day of September, 1988.

/s/

Robert J. McNichols
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

IN RE:	)	
	(	No. 88-4217
REGA PROPERTIES, LTD.,	)	
	(	DC No. CV-87-RJM
Debtor,	)	
	(	
J. REED DUNKLEY, et ux,	)	
	(	
Appellants,	)	ORDER
	(	
-vs-	)	
	(	
REGA PROPERTIES, LTD.,	)	
	(	
Appellee.	)	
	(	

Before: NORRIS, THOMPSON, and O'SCANNLAIN, Circuit Judges

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised on the en banc suggestion, and no judge of

the court has requested a vote on it.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

11 U.S.C.S. 109

Who may be a debtor

(a) Notwithstanding any other provision of this section, only a person that resides or has a domicile, a place of business, or property in the United States, or a municipality, may be a debtor under this title.

(b) A person may be a debtor under chapter 7 of this title only if such person is not--

(1) a railroad;

(2) a domestic insurance company, bank, savings bank, cooperative association, credit union, or industrial bank or similar institution which is an insured bank as defined in section 3(h) of the Federal Deposit Insurance Act (12 U.S.C. 1813 (h)); or

(3) a foreign insurance company, bank, savings bank, cooperative bank, savings and loan association, building and loan association, homestead association, or credit union, engaged in such business in the United States.

(c) An entity may be a debtor under chapter 9 of this title if and only if such entity--

(1) is a municipality;

(2) is generally authorized to be a debtor under such chapter by State law, or by

a governmental officer or organization empowered by State law to authorize such entity to be a debtor under such chapter;

(3) is insolvent;

(4) desires to effect a plan to adjust such debts; and

(5)(A) has obtained the agreement of creditors holding at least a majority in amount of the claims of each class that such entity intends to impair under a plan in a case under such chapter;

(B) has negotiated in good faith with creditors and has failed to obtain the agreement of creditors holding at least a majority in amount of the claims of each class that such entity intends to impair under a plan in a case under such chapter;

(C) is unable to negotiate with creditors because such negotiation is impracticable; or

(D) reasonably believes that a creditor may attempt to obtain a transfer that is avoidable under section 547 of this title.

(d) Only a person that may be a debtor under chapter 7 of this title, except a stockbroker or a commodity broker, and a railroad may be a debtor under chapter 11 of this title.

(e) Only an individual with regular income that owes, on the date of the filing

of the petition, noncontingent, liquidated, unsecured debts of less than $100,000 and noncontingent, liquidated, secured debts of less than $350,000, or an individual with regular income and such individual's spouse, except a stockbroker or a commodity broker, that owe, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts that aggregate less than $100,000 and noncontingent, liquidated, secured debts of less than $350,000 may be a debtor under Chapter 13 of this title.

(f) Only a family farmer with regular annual income may be a debtor under chapter 12 of this title.

(g) Notwithstanding any other provision of this section, no individual or family farmer may be a debtor under this title who has been a debtor in a case pending under this title at any time in the preceding 180 days if--

(1) the case was dismissed by the court for willful failure of the debtor to abide by orders of the court, or to appear before the court in proper prosecution of the case; or

(2) the debtor requested and obtained the voluntary dismissal of the case following the filing of a request for relief from the automatic stay provided by section 362 of this title.

Cases ancillary to foreign proceedings

(a) A case ancillary to a foreign proceeding is commenced by the filing with the bankruptcy court of a petition under this section by a foreign representative.

(b) Subject to the provisions of subsection (c) of this section, if a party in interest does not timely controvert the petition, or after trial, the court may--

(1) enjoin the commencement or continuation of--

(A) any action against--

(i) a debtor with respect to property involved in such foreign proceeding; or

(ii) such property; or

(B) the enforcement of any judgment against the debtor with respect to such property, or any act or the commencement or continuation of any judicial proceeding to create or enforce a lien against the property of such estate;

(2) order turnover of the property of such estate, or the proceeds of such property, to such foreign representative; or

(3) order other appropriate relief.

(c) in determining whether to grant relief under subsection (b) of this sec-

tion, the court shall be guided by what will best assure an economical and expeditious administration of such estate, consistent with--

(1) just treatment of all holders of claims against or interests in such estate;

(2) protection of claim holders in the United States against prejudice and inconvenience in the processing of claims in such foreign proceeding;

(3) prevention of preferential or fraudulent dispositions of property of such estate;

(4) distribution of proceeds of such estate substantially in accordance with the order prescribed by this title;

(5) comity; and

(6) if appropriate, the provision of an opportunity for a fresh start for the individual that such foreign proceeding concerns.

11 U.S.C. SECTION 365

(a) Except as provided in Section 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contact or unexpired lease of the debtor.

. . .

(i)(1) If the trustee rejects an executory contract of the debtor for the sale of real property or for the sale of a timeshare interest under a timeshare plan, under which the purchaser is in possession, such purchaser may treat such contract as terminated, or, in the alternative, may remain in possession of such real property or timeshare interest.

(2) If such purchaser remains in possession-

(A) such purchaser shall continue to make all payments due under such contract, but may, offset against such payments any damages occurring after the date of the rejection of such contract caused by the nonperformance of any obligation of the debtor after such date, but such purchaser does not have any rights against the estate on account of any damages arising after such date from such rejection, other than such offset; and

(B) the trustee shall deliver title to such purchaser in accordance with the provisions of such contract, but is relieved of all other obligations to perform under such contract.

(j) A purchaser that treats an executory contract as terminated under subsection (i) of this section, or a party whose executory contract to pur-

chase real property from the debtor is rejected and under which such party is not in possession, has a lien on the interest of the debtor in such property for the recovery of any portion of the purchase price that such purchaser or party has paid.

11 U.S.C.S. 521

Debtor's Duties

The debtor shall--

(1) file a list of creditors, and unless the court orders otherwise, a schedule of assets and liabilities, a schedule of current income and current expenditures, and a statement of the debtor's financial affairs;

(2) if an individual debtor's schedule of assets and liabilities includes consumer debts which are secured by property of the estate--

(A) within thirty days after the date of the filing of a petition under chapter 7 of this title or on or before the date of the meeting of creditors, whichever is earlier, or within such additional time as the court, for cause, within such period fixes, the debtor shall file with the clerk a statement of his intention with respect to the retention or surrender of such property and, if applicable, specifying that such property is claimed as exempt, that the debtor intends to redeem such property, or that the debtor intends to reaffirm debts secured by such property;

(B) within forty-five days after the filing of a notice of intent under this section, or within such additional time as the court, for cause, within such forty-five day period fixes, the debtor shall perform his intention with respect

to such property, as specified by subparagraph (A) of this paragraph; and

(C) nothing in subparagraphs (A) and (B) of this paragraph shall alter the debtor's or the trustee's rights with regard to such property under this title;

(3) if a trustee is serving in the case, cooperate with the trustee as necessary to enable the trustee to perform the trustee's duties under this title;

(4) if a trustee is serving in the case, surrender to the trustee all property of the estate and any recorded information, including books, documents, records, and papers, relating to property of the estate, whether or not immunity is granted under section 344 of this title; and

(5) appearing at the hearing required under section 524(d) of this title.

11 U.S.C.S. 541

Property of the estate

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

(2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is--

(A) under the sole, equal, or joint management and control of the debtor; or

(B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.

(3) Any interest in property that the trustee recovers under section 329(b), 363(n), 543, 550, 553, or 723 of this title.

(4) Any interest in property preserved for the benefit of or ordered transferred to the estate under section 510(c) or 551 of this title.

(5) Any interest in property that would

have been property of the estate if such interest had been an interest of the debtor on the date of filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date--

(A) by bequest, devise, or inheritance;

(B) as a result of a property settlement agreement with the debtor's spouse, or of an interlocutory or final divorce decree; or

(C) as a beneficiary of a life insurance policy or of a death benefit plan.

(6) Proceeds, product, offspring, rents, or profits of or form property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.

(7) Any interest in property that the estate acquires after the commencement of the case.

(b) Property of the estate does not include--

(1) any power that the debtor may exercise solely for the benefit of an entity other than the debtor; or

(2) any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease before the commencement of the case under this title, and ceases to include any

interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease during the case.

(c)(1) Except as provided in paragraph (2) of this subsection, an interest of the debtor in property becomes property of the estate under subsection (a)(1), (a)(2), or (a)(5) of this section notwithstanding any provision in an agreement, transfer instrument, or applicable nonbankruptcy law--

(A) that restricts or conditions transfer of such interest by the debtor; or

(B) that is conditioned on the insolvency or financial condition of the debtor, on the commencement of a case under this title, or on the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement and that effects or gives an option to effect a forfeiture, modification, or termination of the debtor's interest in property.

(2) A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.

(d) Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest, such as a mortgage secured by real property, or an interest in such a mort-

gage, sold by the debtor but as to which the debtor retains legal title to service or supervise the servicing of such mortgage or interest, becomes property of the estate under subsection (a)(1) or (2) of this section only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold.

Rule 4002

Duties of Debtor

In addition to performing other duties prescribed by the Code and rules, the debtor shall (1) attend and submit to an examination at the times ordered by the court; (2) attend the hearing on a complaint objecting to discharge and testify, if called as a witness; (3) inform the trustee immediately in writing as to the location of real property in which the debtor has an interest and the name and address of every person holding money or property subject to the debtor's withdrawal or order if a schedule of property has not been filed pursuant to Rule 1007; (4) cooperate with the trustee in the preparation of an inventory, the examination of proofs of claim, and the administration of the estate, and (5) file a statement of any change of the debtor's address.

(2)

No. 90-287

THE SUPREME COURT OF THE UNITED STATES

OCTOBER, 1990

J. REED DUNKLEY, and GRACE DUNKLEY, husband and wife,

Petitioners,

v.

REGA PROPERTIES, LTD., et. al.

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

BRIEF IN OPPOSITION TO PETITION

Counsel of Record for
REGA PROPERTIES, LTD.:
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(509) 924-8144

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I.

QUESTIONS PRESENTED FOR REVIEW

Respondent does not cross appeal, and therefore presents no questions to the Court for review. However, the Petition for Certiorari necessarily raises questions which must be addressed at this point in the proceedings. These questions are:

1. Where the appellate court has declined to consider an appeal of an interlocutory order based upon jurisdictional grounds under 28 USC 158(d), should the Supreme Court hear an appeal on the merits of that interlocutory order?
2. Should the Supreme Court consider questions not squarely placed before the lower court?

II.

LIST OF PARENT COMPANIES AND SUBSIDIARIES FOR REGA PROPERTIES, LTD.

PARENTS:

SUBSIDIARIES: Rega Properties, Ltd. and Rhea Farms Ltd., are family corporations. They are solely owned by the Wonnacutt family and have no parents or subsidiaries within the meaning of Rule 29.1.

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IV.

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V.

OPINIONS BELOW

For ease of reference, this brief will refer to opinions as reproduced in the Appendix to the Petition for Certiorari. Page numbers will correspond to those used therein.

VI.

SUPREME COURT JURISDICTION

The Supreme Court does not have jurisdiction to hear this appeal under 28 USC 1254. The decision below was not a final decision of the bankruptcy court and therefore the case was not "in" the appellate court within the meaning of 28 USC § 1254. U.S. v. Nixon 418 U.S. 683, 41 L.Ed 2d 1039, 94 S.Ct. 3090 (1974). The Ninth Circuit Court of Appeals properly determined that it did not have jurisdiction to hear the appeal on the

issue of the motion to dismiss because the refusal to dismiss was not a final decision of the bankruptcy court as required under 28 USC 158(d).

VII.

STATUTES AND RULES

The bankruptcy code sections and the bankruptcy rule cited by Petitioner are not relevant to a determination of this appeal. The sole issue that might properly be before the Court is whether the Ninth Circuit Court of Appeals correctly determined that it had no jurisdiction to review the bankruptcy court's refusal to dismiss the action. That question has not been raised by appellant.

The statutes involved in the determination of this Court's jurisdiction are 28 USC § 158(a)&(d) and

28 USC §1254, the relevant portions of which are reprinted below.

§158. Appeals

(a) The district courts of the United States shall have jurisdiction to hear appeals from final judgments, orders, and decrees, and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title [28 USCS § 157]

. . .

(d) The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section.

§1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; ...

VIII.

STATEMENT OF THE CASE

Respondent believes that Petitioner has made numerous misstatements of fact and law in the Petition For Writ of Certiorari. These misstatements include:

1. At page 2, Petitioner incorrectly states: "The Ninth Circuit has decided an important question concerning jurisdiction of the Bankruptcy Court...." In fact, the Ninth Circuit Court of Appeals opinion dealt with its <u>own</u> jurisdiction to consider the appeal before it. The court ruled that under 28 USC 158(d),

> "the bankruptcy court's order denying Dunkley's motion to dismiss for bad faith filing is not a final order, and thus this court does not have jurisdiction over Dunkley's appeal of that portion of the district court's order which

affirmed such denial."

Appendix to Petition, page 8.

2. The factual questions extensively argued throughout the Petition are not before the Court. The transfers of property and other business transactions in Canada which are described in pages 6-7 were thoroughly reviewed in evidentiary hearings before the bankruptcy court and were subsequently reviewed in the district court upon the record of the bankruptcy court. Similarly, Petitioner's factual arguments regarding bad faith, at p. 18 and pp. 27-36, were fully considered and decided adversely on the record below. The trial judge and the district court judge were satisfied that there was no substantial

evidence of bad faith, fraud, abuse or mismanagement. See opinion of District Court Judge McNichols, Appendix page 21-22 and his extended quotation from the decision of the Bankruptcy Judge at Appendix pages 19-20.

3. Petitioner incorrectly states at page 12, that the Ninth Circuit indicated that the question presented was whether the bankruptcy court should "burden the Canadian Corporation by appointment of a trustee". The motion for trustee was heard and decided in the bankruptcy court but was not appealed to the Ninth Circuit.

4. In his argument at page 12-13, Petitioner incorrectly implies that the question of jurisdiction over

Canadian assets was somehow critical to the lower courts' determinations regarding the appointment of a trustee and dismissal for bad faith. The opinion of the district court and the quotations from the bankruptcy court contained therein make it clear that the courts' decisions on the question of appointment of trustee were based upon factual evidence regarding bad faith and abuse. Each court found no factual justification for the appointment of a trustee. The question of the court's jurisdiction over Canadian assets was not decisive.

5. Finally, at pages 24-27 and again at page 35-36, Petitioner attempts to reargue the bankruptcy court's

approval of the rejection of the real estate contract. That issue is clearly not before the court. See Judge McNichol's opinion, Appendix pp 16-17. The decision of the bankruptcy court became final and unappealable on March 3, 1986. No appeal was perfected from that order and it is, therefore, the law of the case.

IX.

SUMMARY OF THE ARGUMENT

A. Petitioner purports to present three tightly drawn legal questions for the Court's consideration. However, this case is not the proper vehicle with which to raise either the legal questions listed or the factual questions argued. The question before the Ninth Circuit Court of Appeals was whether the

bankruptcy should have been dismissed for bad faith. The district court had examined the evidence before the bankruptcy court and refused to find error. The Ninth Circuit Court of Appeals reviewed the question again and determined that it had no jurisdiction to consider that issue. Since the initial decision was not a final appealable order, it was not properly in the Ninth Circuit Court of Appeals. Therefore, this Court should not accept jurisdiction to determine an appeal on that issue under 28 USC §1254.

B. The questions argued in the Petition were not presented to the lower courts. Although Petitioner did raise the question of jurisdiction over Canadian assets in the context of a Motion for Appointment of Trustee, the

court ultimately decided the motion on the basis of factual evidence before it regarding good faith, etc. Furthermore, even if the court's decision on the appointment of trustee or rejection of the contract involved questions regarding its jurisdiction over Canadian assets, Petitioner did not appeal either of those decisions.

The time for raising the issues Petitioner now tries to raise has passed. The bankruptcy court has determined the amount of Petitioner's claim and damages are fixed. Respondent has set aside sufficient money to pay those damages. It is appropriate that appellate proceedings should cease and this bankruptcy should be completed.

X.

ARGUMENT

1. THE SUPREME COURT DOES NOT HAVE JURISDICTION TO HEAR AN APPEAL FROM THE BANKRUPTCY COURT'S ORDER DENYING A MOTION TO DISMISS.

The first order of business for the Court is that it must determine whether it has jurisdiction under 28 USC §1254. That issue turns on whether the case was properly "in" the court of appeals when the Petition for Certiorari was filed in this court. U.S. v. Nixon, 418 U.S. 683, 690, 41 L. Ed.2d 1039 94 Sup.Ct. 3090, (1974). The case was properly in the court of appeals only if the court of appeals had jurisdiction under 28 USC § 158(d). That section states: "the court of appeals shall have jurisdiction of

appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section." The Ninth Circuit Court of Appeals correctly determined that:

> "the bankruptcy court's order denying Dunkleys motion to dismiss for bad faith filing is not a final order, and thus this court does not have jurisdiction over Dunkley's appeal of that portion of the district court's order which affirmed such denial." Appendix, Page 8.

The circuit court's decision is consistent with this Court's decisions in similar cases. In Lauro Lines s.r.l. v. Chasser, 490 U.S. _____, 109 Sup.Ct. 1974, 104 L. Ed.2d 548(1989), this Court determined that a denial of a motion to dismiss a damages action based upon a contractual forum selection clause was not a final order and therefore not appealable under 28 USC § 1291.

The Lauro case is but a recent example of this Court's long standing policy against deciding litigation in a piecemeal fashion. See, Cobbledick v. U.S., 309 U.S. 323, 324, 60 S.Ct. 540, 84 L.Ed. 783 (1940). "Finality as a condition of review is an historic characteristic of federal appellate procedure." Cited in Nixon at 690. In 1892, this Court construed its jurisdictional statute, the Judiciary Act of 1789,to limit appellate jurisdiction to "final judgments at law and final decrees in equity and admiralty." American Construction Co. v. Jacksonville Railway, 148 U.S. 372, 378, 37 S. Ct. 486 (1892).

The Court should apply these well established principles to this case. The bankruptcy action is very near to

conclusion. The damages for rejection of the contract have been determined and the decision regarding those damages has not been appealed to this Court. Respondents have placed more than sufficient money in the control of the court, to cover the damages assessed. This matter can and should be terminated.

2. THIS COURT SHOULD NOT CONSIDER ISSUES WHICH WERE NOT SQUARELY PRESENTED TO THE COURTS BELOW.

The Petition for Certiorari seems to present the Court with the intellectually interesting question of the U.S. Bankruptcy Court's jurisdiction over foreign assets. However, that issue is not presented by the case that is actually before the Court. The question

of the bankruptcy court's jurisdiction over Canadian assets arose briefly below in the context of arguments supporting and opposing the motion to appoint a trustee. The decision not to appoint a trustee was made on the basis of evidence regarding claims of improper management of Canadian assets, preferential treatment of Canadian creditors, and related matters. The bankruptcy judge's observations on those issues are quoted in Judge McNichols' opinion at Appendix pages 19 and 20. In a nutshell, the bankruptcy judge found no basis for finding mismanagement of assets and therefore refused to appoint a trustee.

The refusal to appoint a trustee was not appealed to the Ninth Circuit Court of Appeals. Petitioner specifically stated in his Appellant's Brief before

the Ninth Circuit: "part [of the order appealed from] denied was for the appointment of a trustee. The Dunkleys do not appeal from that decision." Appellants Brief Page 1.

Only two issues were presented to the Ninth Circuit Court of Appeals by petitioners. These were the choice of the measure of damages applied after the rejection of the real estate contract and the refusal to dismiss the bankruptcy for bad faith. The appellate court upheld the bankruptcy court's decision on the measure of damages and determined that it did not have jurisdiction under 28 USC § 158(d) to hear the appeal from the decision on the motion to dismiss.

Petitioners have not appealed the ruling on the measure of damages, nor have they appealed the decision on

jurisdiction. It would be improper for this Court to review findings of fact or conclusions of law regarding the motion to appoint a trustee where the appellant had not raised those issues before the circuit court of appeals. See McCullough v. Kammerer Corp., 323 U.S., 327, 328. 65 S.Ct. 297, 89 L.Ed. 273, (1945).

Similarly, Petitioner's arguments regarding the appropriateness of rejection of the contract were not presented to the appellate court below. The decision of the bankruptcy court on rejection was not appealed. As Judge McNichols stated in his opinion "the Order authorizing such rejection was not appealed and the efficacy of that Order is not before this court." (Appendix pages 16-17). Furthermore that issue was not presented to the Ninth Circuit Court

of Appeals. Under the McCollough rationale, the Supreme Court should refuse to consider that issue as well.

Equally inappropriate would be a reconsideration of the evidence regarding petitioner's bad faith allegations. Although he did not list the issue as a question for review, Petitioner has devoted a substantial portion of his brief to the reargument of his claims of bad faith. An example is Petitioner's statement at page 27: "The facts of this case clearly show that dismissal for lack of good faith is an appropriate sanction."

Petitioner is attempting to get this Court to review the facts as presented in evidentiary hearings before the bankruptcy court and to reach a different conclusion than the trial judge. This is

contrary to the Court's often expressed policy against reviewing factual questions. See, e.g. Goodwin v. Lukens Steel Co., 482 US 656, 665, 107 S.Ct. 2617, 96 L.Ed. 2d, 572 (1987), and see U.S. v. Johnston, "we cannot grant certiorari to review evidence and discuss specific facts." 268 U.S. 220, 227, 45 S. Ct. 496, 69 L.Ed 925 (1924).

It is well established that a court's finding as to good faith in the context of a bankruptcy is a factual determination that cannot be set aside unless it is clearly erroneous. In Re Northeast Corporation, 519 F.2d 1360, 1363 (1975).

This Court, should not accept Petitioner's invitation to delve into the findings. The Petitioner has not properly set out the findings with which

he disagrees nor has he candidly stated to the Court that he proposes a review of the evidence. Furthermore, because of its decision on its own jurisdiction, the Ninth Circuit Court of Appeals never considered or ruled upon the factual issues raised in that court. If ever there was a case where the Court should refuse to examine the evidence for correction of errors, this is such a case. Under either of the McCollough or the Goodman rationale, the Court should refuse certiorari.

XI.

CONCLUSION

Petitioner has presented no good reason for this Court to grant the Writ of Certiorari. Petitioner has shown no conflict among the circuits, no question of wide impact under the Constitution, no

reason to exercise supervisory power over lower courts. Petitioner has attempted to package his appeal as an intellectually interesting problem. In fact, however, all that this case presents is a factual dispute between litigants in a single bankruptcy proceeding.

The amount in dispute here has been determined by the bankruptcy court and the propriety of the measure of damages was affirmed by the Ninth Circuit Court of Appeals. That amount of Petitioner's claim as determined by the bankruptcy court is $4,969.00 which, together with pre-petition attorney fees, $6,361.40, places the total amount in controversy at $11,330. Respondent has funds available and set aside to pay that amount.

Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

DATED this 28th day of August, 1990.

Respectfully submitted,

Robert J. McKanna

NO. 90-287

THE SUPREME COURT OF THE UNITED STATES

OCTOBER, 1990

J. REED DUNKLEY and GRACE DUNKLEY,
husband and wife,

Petitioners,

v.

REGA PROPERTIES, LTD., et al.

Respondents.

REPLY BRIEF TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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This reply brief is being presented pursuant to Rule 15.6 of the Rules of the Supreme Court, to address two issues raised in the brief in opposition to the petition for writ of certiorari to the Ninth Circuit.

Respondent raises two questions for review. In the first question, respondent asks whether the Supreme Court has authority to review what respondent terms an interlocutory order. In the second question, respondent asks whether the Supreme Court has authority to consider a question not squarely placed before the lower court.

The answers are detailed below. In brief, the answers are:

1. The United States Supreme Court has authority to review a case such as this, even if part of it has been termed inter-

locutory by the Ninth Circuit.

2. The issue of jurisdiction was raised below in the first hearing held on the motion to dismiss, and subsequently ignored by each judicial officer.

CERTIORARI

28 U.S.C. 1254, the statute relied upon by petitioner to seek certiorari, grants the United States Supreme Court power to review any case it deems appropriate. This certiorari power is very broad and there is no technical finality requirement involved. Nevertheless, the decisions of the Bankruptcy Court, District Court, and Court of Appeals were final and appealable.

The Supreme Court's power of certiorari is considerably broad. The Court may review virtually any case it chooses. While most cases arise after adjudication

in the Courts of Appeals, certiorari power is so broad that it may interrupt lower court proceedings, [1] or even pre-empt them. [2]

The power to review interlocutory rulings of lower courts can be derived from the general provisions of the certiorari statute and the all writs act. See Davis v. Jacobs, 454 U.S. 911, 102 S.Ct. 417, 70 L.ed.2d 226 (1981).

There is, therefore, no finality requirement which must be met prior to petitioning for a Writ of Certiorari. The certiorari power has expanded to the point of eliminating that requirement altogether when the decision for which

---

[1]. See Forsyth v. City of Hammond, 166 U.S. 506, 17 S.Ct. 665 (1897).

[2]. See U. S. v. Nixon, 418 U.S. 683, 94 S.Ct. 3090 (1974).

review is requested is from a lower federal court. The Supreme Court has jurisdiction to issue a writ of certiorari without a finality requirement. Indeed, Certiorari has been granted to review non-final dispositions without any further explanation. See, e.g., INS v. Cardoza-Fonseca, 107 S.Ct. 1207, 1210, 94 L.Ed.2d 434 (1987). Certiorari has even been granted over objection that the case was not ready for review. See Estelle v. Gamble, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976).

At any rate, Certiorari is proper in this case because, first, the decisions in the lower federal were final and appealable, and, second, the issue raised in the Petition for Certiorari is the jurisdiction of the Bankruptcy Court to grant relief.

The decision by the Bankruptcy Court to deny a motion to dismiss is final and properly appealable under these facts because (1) the Bankruptcy Court immediately granted affirmative relief to the debtor, which caused serious and irreparable harm to the Dunkleys, and (2) the District Court and the Ninth Circuit affirmed the relief granted to the debtor. Far from being an interesting intellectual argument to the Dunkleys, and far from being merely an interlocutory decision, the refusal to dismiss the debtor or to appoint a trustee to bring in the Canadian assets effectively eliminated the Dunkley's interest in the property. Under either of two tests developed by the Ninth Circuit, the case is final. Under the test developed in In re Mason, 709 F.2d 1313, 1316 (9th Cir. 1983), an

interlocutory order is reviewable if it "may determine and seriously affect substantive rights" and "cause irreparable harm to the losing party if he had to wait to the end of the bankruptcy case." How much more seriously can property rights be affected than to say that they no longer exist? How much more damage can accrue than to be told that your own government is going to sacrifice your property rights so a Canadian firm can reorganize its Canadian assets?

The same result occurs when the "need-for-immediate-review" test from In re Brissette, 561 F.2d 779 (9th. Cir. 1977), is applied. In this test, the Court of Appeals decided that immediate review can be granted when an exemption becomes "the final resolution of the rights of the parties for practical pur-

poses." In re Brissette, 561 F.2d 779, 782 (9th. Cir. 1977). The Court of Appeals affirmed a measure of damages used by the Bankruptcy Court to assess the damages caused to the Dunkleys. Applying practical reason to the problem, the decision was final, even if the decision also included an appeal from a denial of a motion to appoint a trustee.

JURISDICTION

The Court also has the power to grant review in this case because the jurisdiction of the lower court to proceed is the issue in question. Mansfield, Colwater and Lake Michigan Ry. Co. v. Swan, 111 U.S. 379, 4 S.Ct. 510, 28 L.ed. 462 (1884).

Although the issue of jurisdiction of the lower court to proceed can be raised at any time, Mansfield, Colwater

and Lake Michigan Ry. Co. v. Swan, supra, the issue was raised early on in the proceedings. On March 18th, 1986, the issue was placed squarely before the Honorable John M. Klobucher, a judge in the Bankruptcy Court:

> THE COURT: Is it your position, Mr. McKanna, that the liability to the creditors in this proceeding is limited to the assets that are in the Court's jurisdiction?
>
> MR. MCKANNA: It's my understanding, Your Honor, that the liability to the creditors--first of all, it was my position in the research that I did that the jurisdictional aspect of the Court was with the property and the assets that are before the Court in the United States. It was not my feeling from the material that I obtained that this Court could administer the property in Canada.
>
> ...
>
> MR. HERMAN: The case law that we found, Your Honor, all says that all means all and wherever situated means wherever situated. Canadian bankruptcy law says the same thing, interestingly enough. I can't find a case anyplace that stands for the

> proposition that you can bifurcate a corporation and hav bankruptcy in different jurisdictions, cut it up however to suit you. (CP 136, pages 2-4).

Thus, it is clear that the issue of jurisdiction had at one time been raised. The Bankruptcy Court felt it had no jurisdiction over the assets in Canada, so it simply administered the assets in the United States, leaving substantial assets in the hands of the debtor. That is not how a bankruptcy is supposed to work, and calls for dismissal on either jurisdictional or bad faith grounds.

CONCLUSION

The power of the Courts is to do what is right. The United States Supreme Court is vested with the power to take control of this case and decide whether the Bankruptcy Court had the authority to proceed as it did.

RESPECTFULLY SUBMITTED this 28th day of September, 1990.

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by:

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